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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Truth-in-Billing	)	**CC Docket No. 98-170**
	)	
and	)	
	)	
Billing Format	)	
	)	

COMMENTS
OF
AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION
("ACTA")

America's Carriers Telecommunication Association ("ACTA"), by its attorneys, submits these comments in the above-referenced proceeding pursuant to Sections 1.415 and 1.419 of the Commission's Rules.

I. INTRODUCTION

Founded in 1985, ACTA is a national trade association with over 260 members consisting of interexchange carriers ("IXCs"), competitive local exchange carriers ("CLECs"), information service providers and related vendors, including competitive billing companies and clearing houses.

ACTA shares the Commission's concern that too many consumer bills are confusing or misleading. However, ACTA contends that the Commission should focus its reform efforts on the local monopolies that dominate the billing industry. The NPRM should not treat all billing companies the same because competitive billing entities are far different from incumbent local exchange carriers ("ILECs"), particularly the Regional Bell Operating Companies ("RBOCs"). The Commission should devote its limited resources to ensuring that these entities cease their attempts to stifle telecommunications competition through the practices of their billing departments. The free market will govern the behavior of competitive billers.

Alternatively, should the Commission issue new regulations governing billing practices, it should not attempt to micromanage the form and content of bills. Not only would such a regulatory regime be unconstitutional under the First Amendment, it would severely harm competition as well. The design and content of telephone bills has become one of the most important competitive tools carriers can use to gain and keep new customers. A government mandated "one-size-fits-all" approach to billing would merely strengthen the RBOCs domination of the billing industry and put scores of entrepreneurs out of business. Furthermore, deceptive billing practices are already illegal at both the federal and state levels and offenders should be punished by the maximum penalties allowed by existing laws. Issuing anything more stringent than general guidelines would be redundant.

Nonetheless, if the Commission is determined to issue billing rules, it should adopt voluntary guidelines or allow carriers and competitive billing companies to commit to a voluntary code of conduct.

II. <u>ARGUMENT</u>

A. The Commission Should Focus Only On LEC Billing Activities.

ACTA is concerned that with this NPRM, the Commission is attempting to "have it both ways." On the one hand, it is trying to adhere to its 1986 decision[1] to forbear from requiring LEC

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[1] *Detariffing of Billing and Collection Services*, Report and Order, 102 F.C.C.2d 1150, 1169-71 (1986) ("*Detariffing Order*").

billing services to be tariffed because the billing marketplace is "fully competitive." On the other hand, the Commission is saying that competition alone is not sufficient to solve consumer problems associated with billing services, which, therefore, must be regulated. ACTA contends that this apparent contradiction could be resolved if the Commission would focus only on LEC billing services. Competitive billing companies are just that - competitive - and do not need regulation. Moreover, the Commission has not demonstrated the need to regulate competitive billers in its NPRM. However, even though the marketplace for independent billers is competitive and is therefore self-regulated, the Commission should focus its attention on LEC billers because they use their dominant billing market power to harm telecommunications competition (*see infra*). Accordingly, ACTA contends that the fundamental premise of the Commission's 1986 order de-tariffing LEC billing services is no longer valid. That premise will become even more faulty once the RBOCs are allowed into in-region long distance and will be in the position of competing against their IXC billing customers.

1. The Commission Has The Jurisdiction To Regulate LEC Billing Services.

The Commission itself acknowledges that "billing and collection is incidental to the transmission of wire communications and thus is properly considered a communications service under Section 3(a) of the Act . . . ."[2] In so holding, the Commission recognized that its *Detariffing Order* was not entirely correct in this regard and, therefore, the Commission held that it had Title

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[2] *See Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 7 FCC Rcd 3528, 3530-3533 (1992), *clarified on reconsideration*, 12 FCC Rcd 1632, 1643-1645 (1997).

I jurisdiction.[3] Similarly, the Commission recognizes that it has Title II jurisdiction when billing and collection services are provided by common carriers to their own end users.[4] However, ACTA contends that the Commission also has ancillary jurisdiction over LEC billing under Title II for the same reasons it has enumerated in several proceedings regarding this issue. For example, in a 1989 decision, the Commission concluded that besides "affecting" interstate communications, the billing and collection services that a LEC provides for an IXC are also "closely related to the provision of [such] services," since billing and collection must occur for a carrier to offer its services economically.[5] Despite the Commission's opinion to the contrary in the NPRM, the same reasoning applies to Title II.[6] Nonetheless, ACTA contends that the Commission can exercise jurisdiction over LEC billing services under either title and should do so to protect the public interest against present and future RBOC anticompetitive conduct. ACTA just as adamantly asks the Commission not to regulate competitive billers because the conduct of these entrepreneurs is regulated by the marketplace.

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[3] Section 201 of the Communications Act requires that "all charges, practices, classifications, and regulations for and in connection with . . . communication service, shall be just and reasonable." 47 U.S.C. § 201(b). Section 202 makes it unlawful for any common carrier to make any "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with . . . communication service, directly or indirectly . . . ." 47 U.S.C. § 202(a). In the *Detariffing Order*, the Commission merely exercised regulatory forbearance but still maintained its jurisdiction over such services. *Detariffing Order* at 1169-71.

[4] *See Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 7 FCC Rcd at 3530-3533 (1992), *clarified on reconsideration*, 12 FCC Rcd at 1643-1645 (1997).

[5] *See Public Service Commission of Maryland*, 4 FCC Rcd 4000, 4004-4006 (1989), *aff'd Public Service of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990).

[6] *See* NPRM at ¶ 12.

2. The Commission Should Grant ACTA's Petition for Declaratory Ruling And Hold That LEC Billing Services And BNA Are UNEs.

Several of ACTA's IXC members have reported that LECs consistently abuse their market powers as billers. All of these IXCs feared LEC retaliation if they came forward publicly to voice their concerns, so ACTA will not reveal their identities. For example, based on the information provided to ACTA, LECs frequently consider customer inquiries regarding the Primary Interexchange Carrier Charge ("PICC") and Universal Service line items as incidents of "cramming" even though IXCs have every legal right to bill these charges. Once a LEC receives an arbitrary number of such inquiries, or if the LEC feels that an IXC is marketing it services improperly or charging too high a rate for certain offerings, the LEC will unilaterally and without notice cut off all billing services to that IXC.[7] For IXCs that rely exclusively on LEC billing services, such Draconian actions can be economically fatal.

Similarly, the LECs have been undermining carriers that market casual calling or dial-around services. In January of 1997, ACTA filed a petition for declaratory ruling[8] asking the Commission to declare casual calling billing information ("BNA") an unbundled network element as mandated by the Telecommunications Act of 1996[9] because LECs were refusing to render such information to IXCs upon reasonable request. As the Commission continues to sit on ACTA's petition, as well

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[7] *See, e.g.*, Request of Pilgrim Telephone for Expedited Action on MCI Rulemaking Petition, RM-9108 (filed Sept. 24, 1998).

[8] *In the Matter of Incumbent Local Exchange Carriers Providing Interexchange Carriers With Access To Casual Calling Billing Information, America's Carriers Telecommunication Association Petition for Declaratory Ruling*, DA 97-825 (rel. April 18, 1997).

[9] 47 U.S.C. § 3(29).

as MCI's related petition for rulemaking,[10] IXCs are incurring millions of dollars in losses in calls that are unbillable because LECs refuse to provide the information and/or services necessary to collect them. Requiring the LECs to tariff such services and provide them upon reasonable request would eliminate their ability to use their dominance of the billing services market as an anticompetitive weapon. Billing services have become such an integral part of the telecommunications industry that any abuse of market dominance ultimately harms competition. Furthermore, once allowed into in-region long distance, the RBOCs will have greater incentives to harm their IXC competitors by abusing their unique position as billers for their competitors. At a minimum, the Commission should grant ACTA's and MCI's petitions and declare that BNA and billing services are unbundled network elements under the 1996 Act.

B. If The Commission Elects To Regulate Billing Services, It Should Only Prescribe General Principles.

1. Carriers Have The Right To Bill And Label Government Mandated Charges, Such As The PICC And New Universal Service Contributions.

As the Commission aptly noted in the NPRM, the government cannot ban truthful commercial speech in a crusade to protect consumers. NPRM at ¶ 15 citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). It is truthful for carriers to proclaim on bills that the PICC and Universal Service contributions that they are being charged are the result of government actions. The Commission implies in its NPRM that carriers should not be allowed to refer to these charges as being related to government action. NPRM at ¶¶ 15, 20, 21 and 25. ACTA is deeply troubled

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[10] *In the Matter of MCI Communications Corporation Petition for Rule Making re Billing and Collection Services Provided by Local Exchange Carriers for Non-Subscribed Interexchange Services,* RM-9108.

by this implication and the imperious tone the Commission conveys when addressing this issue. Although the Commission did not require IXCs to bill PICCs and USF charges as separate line items, it did not prohibit such actions.[11] Therefore, carriers have a constitutional right to label them as being the direct result of Commission action because such statements are truthful. The Commission cannot and should not attempt to forcibly enlist the services of carriers to be its public relations agents in a game of "hide-the-tax." Any such attempts by the Commission will be challenged successfully in court.[12]

2. The Commission Should Encourage, But Not Require, Certain Billing Behavior Through The Adoption Of A Voluntary Code Of Conduct.

As stated above, ACTA believes that competitive billers should not be regulated, but if the Commission concludes otherwise, it should allow self-regulation through the adoption of a voluntary code of conduct. Once the existence of the code is publicized, consumers could then use the code as a basis for which to choose among carriers. Non-code carriers would not have the advantage of using the marketing power and goodwill associated with the code. While ACTA is still contemplating the details of this code, below is a summary of some of the issues it should address.

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[11] More than likely, the Commission did not attempt to prohibit such charges from being listed separately because it knew that, under the First Amendment, speech regarding government action is protected as a core fundamental right. The burden of proving such speech as being unprotected rests with the Commission. *See e.g., Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

[12] Furthermore, the Commission seems to chafe at the fact that thousands of consumers have called or written it to complain about the PICC and USF line items appearing on their bills. NPRM at ¶ 25, n.50. The Commission implies that this outpouring of consumer angst is the result of carriers revealing to them that the Commission assessed these new charges on IXCs which, in turn, bill them to end users to recover their costs. The Commission fails to note that such complaints could also be construed as the citizens petitioning their government in protest over new tax-like requirements. Such protest is not only protected by the First Amendment but is an encouraging sign that the citizenry wishes to be involved in the policy process. The Commission should not look upon the receipt of such complaints as a burden, but as powerful polling data regarding the palatability of its actions.

Code carriers should conspicuously display: what services are new to the consumer since the last bill; their name and logo; a toll-free customer service number and address.[13] Bills should not differentiate between deniable and non-deniable charges. In essence, all bills are deniable in that a service, be it local or long distance, can be disconnected for non-payment of the relevant service. Consumers would only be confused if they were led to believe that one service or the other could not be disconnected for non-payment. Furthermore, such Commission action could undermine carriers' collection rights under the filed tariff doctrine. Additionally, the Commission would be giving the local monopolies additional marketing advantages over their competitors by implying to consumers that it is acceptable to withhold payment from IXCs but not LECs.

Any "Safe Harbor" language must be part of a voluntary code. As stated above, any attempt to prescribe in detail specific verbiage may not survive judicial scrutiny. However, the Commission could avoid a constitutional law problem by simply offering suggested verbiage as part of the code. However, the Commission cannot discourage the use of such phrases as "Federal Access Charge," "Local Phone Co. Access Charge," "Carrier Line Charge," or even "FCC Access Charge" to describe the PICC because all of those descriptions are accurate. Again, as stated *supra*, the PICC exists because of Commission action and carriers have not been prohibited from listing these costs as separate line items. Therefore, the Commission must allow carriers to use such language as a matter of constitutional law, regardless of how irritated the Commission may become as a result of such

[13] Switchless resellers' names and logos should also appear on the bill. ACTA concurs with the Commission in this regard but is concerned that paragraph 23 of the NPRM implies that resellers are not carriers. Addressing the issue separate and apart from whether other carriers should do the same only perpetuates discriminatory treatment of resellers. Facilities-based carriers and switchless resellers are both carriers under the law, therefore there is no need for the Commission to address their circumstances differently in this regard.

actions. Consumers may continue to be somewhat confused by the use of this language, but then again, the Byzantine regulatory framework governing telecommunications is confusing even to those who are schooled in the intricacies of the industry. Perhaps the best way for the Commission to ensure that consumers won't be confused is to simplify its regulations. Meantime, deceiving consumers into believing that the intricate web of access charges and Universal Service subsidies is anything less than arcane is not an honest option.

3. Proposals that Would Require IXCs To Disclose All Of Their Costs Would Disproportionately Harm Small Carriers.

ACTA believes that the Commission is venturing onto dangerous ground when it proposes in paragraph 31 to require IXCs to disclose the details of their costs to consumers. In what other competitive market are market players required by law to make such disclosures?[14] The Commission has been claiming for years that long distance is competitive, therefore prices should be as close to cost as demand will allow. Additionally, ACTA contends that if the Commission will demand such disclosures of IXCs, it should also demand that the local monopolies make such disclosures. The monopolies have never had to make such public disclosures even though they have enjoyed 100% marketshare and government guaranteed rates of return for 100 years. Furthermore, such a

[14] In fact, for bills to be fully "truthful" shouldn't consumers be informed that roughly 40% of their long distance bills consist of access charges that are ultimately paid to the local phone companies? Perhaps the Commission should consider having the LECs bill end users directly for originating and terminating access charges. After all, that would be the most truthful method of billing for these calls. At the same time, consumers could see an immediate "pass through" benefit to access charge reform; that is, if access charges were truly reduced to cost. At a minimum, the Commission should allow IXCs to disclose on bills a good faith estimate as to what the consumer is paying in access charges on a percentage basis. Consumers need to know where their money is going.

requirement would disproportionately harm smaller carriers that do not necessarily have the resources to make such economic calculations in great detail.[15]

III. CONCLUSION

For the reasons stated above, ACTA strongly urges the Commission to require only LEC billers to tariff their billing services or, in the alternative, establish a voluntary code of conduct for carriers and billers in order to protect First Amendment rights.

Respectfully submitted,

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rmm/070/truth/comment

[15] As ACTA has argued before this Commission several times in other proceedings, the Commission continues to ignore its duties under the Regulatory Flexibility Act (5 U.S.C. §§ 601-602) and properly analyze the effect of its decisions on small businesses. This is not only ACTA's opinion, but that of the expert agency in charge of advocating the interests of small businesses. *See Ex Parte* Comments and Petition for Reconsideration for Access Charge Reform of the Office of Advocacy of the U.S. Small Business Administration, *et al.*, CC Docket No. 96-262 filed November 21, 1997.

CERTIFICATE OF SERVICE

I, Robert M. McDowell, do hereby certify that on this 13th day of November, 1998, I have served copies of the following document via messenger to the following:

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